

Sheet Metal Workers Local No. 66, AFL-CIO and Magnolia Contractors, Inc. and Sound Air, Inc.

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local #32, AFL-CIO and Magnolia Contractors, Inc. and Sound Air, Inc.

United Brotherhood of Carpenters and Joiners of America, Millwrights Local 204, AFL-CIO and Magnolia Contractors, Inc. and Sound Air, Inc. and Magnolia Contractors, Inc. and Sound Air, Inc. Cases 19-CD-468, 19-CD-469, and 19-CD-470

February 13, 1995

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The charges in this 10(k) proceeding were filed on July 20, 1994, by the Employers, Magnolia Contractors, Inc. and Sound Air, Inc., alleging that the Respondents, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local #32, AFL-CIO (Plumbers), Sheet Metal Workers Local No. 66, AFL-CIO (Sheet Metal Workers), and United Brotherhood of Carpenters and Joiners of America, Millwrights Local 204, AFL-CIO (Millwrights), violated Section 8(b)(4)(D) of the National Labor Relations Act by threatening, coercing, and restraining Magnolia and Sound Air for the express purpose of assuring that the disputed work either remain assigned or be reassigned to individuals represented by the respective Unions. The hearing was held on August 8, 1994, before Hearing Officer James R. Kobe.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employers, Magnolia Contractors, Inc. and Sound Air, Inc., are separate entities and each is a Washington corporation involved in building and construction in the Seattle, Washington area. The parties stipulate, and we find, that each Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Sheet Metal Workers Local 66, Plumbers Local 32, and Millwrights Local 204 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

In August 1991, Magnolia, a mechanical and general contractor, was awarded the contract to renovate the existing primary treatment facility at the West Point Sewage Treatment Plant in Seattle, Washington. The main purpose of the renovation was the installation of an odor control system that will prevent foul air from the raw sewage held in the storage tanks from exiting into the atmosphere. The project involves the renovation of concrete sedimentation tanks, the modification of their mechanical equipment, and the installation of metal covers on the tanks. The tank covers are placed on support brackets secured to the concrete tank sides. The covers and support brackets are fabricated by an offsite supplier. The new odor control system also includes a foul air extraction system consisting of an air intake louver installed at one end of each renovated tank and an aluminum foul air extraction duct connection installed at the other end.

Magnolia has been performing all of the tank work with its employees, with the exception of the foul air extraction duct work, which has been subcontracted to Sound Air, a heating, ventilation, and air-conditioning subcontractor. Magnolia assigned the installation of the tank covers and support brackets to its employees represented by the Millwrights and it assigned the piping on one water conveyance system and modification of the launderers on another water conveyance system to its employees represented by the Plumbers. Sound Air assigned its work to its employees represented by the Sheet Metal Workers.

According to Magnolia's project superintendent, Harry Fisher, in May 1994, Bob Giron, a business representative of the Plumbers, contacted him and claimed the work on the tank covers and brackets as well as the foul air extraction duct work. Fisher testified that Giron informed him that the Plumbers claimed the odor control work and described the odor control work as incorporating the "covers, the supports, the duct work, the foul air duct work and so forth."

By letter dated June 3, 1994, the Plumbers' business manager, Al Sexton, requested Fisher to attend a meeting of the Plumbers' executive board or risk being fined.¹ At that meeting, Sexton testified that the Plumbers' jurisdiction and the installation of the duct work, tank covers, and supports at the West Point project were discussed. Sexton testified that he indicated that the Plumbers claimed the work on the covers and the supports.² Fisher testified that Sexton told

¹ Fisher is a member of United Association of Journeymen and Apprentices for the Plumbing and Pipe Fitting Industry, Local 598.

² According to Sexton's testimony, sometime in November 1993, the Plumbers claimed the work and told Fisher that it should be assigned to the Plumbers.

him that if the installation of the supports by the Millwrights continued, the Plumbers would pull its men off the project.³ On June 8, 1994, according to Fisher, Bob Arias, the shop steward for the Plumbers, visited Fisher at the jobsite and informed Fisher that he would instruct the Plumbers to walk off the project if the Millwrights continued to install the support brackets. Dan Nordstrom, general manager of Magnolia, testified that, shortly after the meeting between Arias and Fisher, Arias repeated the threat. According to Nordstrom, Arias told Nordstrom that “he was instructed to pull the men” if Nordstrom continued to have the Millwrights install the supports. Sexton testified that neither he nor any of the Plumbers’ stewards or business agents told Magnolia that the Plumbers would strike or take economic action because of the dispute. No work stoppages or picketing occurred at the jobsite.

Nordstrom advised Linda Dupuis-Fricke, president of Sound Air, to delay starting the job until July 5, and Sound Air agreed. On or about June 22, 1994, the Plumbers filed a grievance against Magnolia. Shortly after the grievance was filed, William Sullivan, the business agent for the Millwrights, approached Nordstrom and informed him that the Millwrights would not allow their work to be taken away. On about July 10, 1994, Nordstrom received a letter from Sullivan stating that “if the job assignment changes, [the Millwrights] will take all economic action necessary to protect [their] job assignment.” On July 14, 1994, the Plumbers demanded arbitration of the grievance. By letters dated July 18, 1994, Ken Peterson, business manager of the Sheet Metal Workers, informed Magnolia and Sound Air that the Union would take economic action to protect its assignment to complete the foul air extraction duct work.

B. Work in Dispute

At the hearing, the parties stipulated that the work in dispute involves all aluminum duct work and duct work accessories and all work on support brackets and tank covers at the West Point Treatment Plant. Magnolia Contractors, as a general contractor at the Treatment Plant, assigned all work on support brackets and tank covers. Sound Air, under its subcontract with Magnolia for the West Point project, assigned all aluminum duct work and duct work accessories work. At the hearing, the parties also stipulated that the Millwrights claim only the support brackets and tank covers, that the Sheet Metal Workers claim only the duct

work and duct work accessories work, and that the Plumbers claim both parts of the disputed work.⁴

C. Contentions of the Parties

The Employers, Magnolia and Sound Air, contend that each Union has threatened them in an attempt to influence the assignments of work and that this dispute is therefore properly before the Board for determination. The Employers argue that the Unions claim the work in dispute and that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated based on the threat by the Plumbers to walk off the job if the work on the tank covers, support brackets, and the foul air extraction duct system was not reassigned to the employees represented by the Plumbers, the threat by the Millwrights to take economic action if the tank covers and support bracket work was reassigned to the Plumbers, and the threat by the Sheet Metal Workers to take economic action to protect its assignment to complete the foul air extraction duct system. The Employers further contend that the current assignments of the disputed work should be upheld based on the factors of the Employers’ collective-bargaining agreements, their preference and past practice in making such assignments, the practice in the industry, the qualifications and skills of the employees represented by the Millwrights and Sheet Metal Workers, and economy and efficiency. Finally, the Employers request an award of the disputed work that is coextensive with the geographical jurisdiction of the Plumbers, arguing that the Plumbers will continue to claim the disputed work on future projects and that the Millwrights and Sheet Metal Workers will also continue to claim the work and enforce their claims with impermissible threats and coercion.

The Plumbers contend that there is no reasonable cause to believe that they violated Section 8(b)(4)(D) of the Act because their grievance does not constitute a claim for the work. The Plumbers contend that this is a contract action involving that Union and Magnolia and that the June 1994 grievance and request for arbitration does not constitute coercion within the meaning of Section 8(b)(4)(D). The Plumbers further contend that there has been no economic strike, picketing, or boycott to coerce Magnolia to assign the work. Although the Plumbers acknowledge contradictory evidence in the record regarding illegal threats, the Plumbers note that these alleged statements were not accompanied by actual striking or picketing. The Plumbers further contend that Magnolia has waived its right to file 8(b)(4)(D) charges by agreeing to alternate

³ According to Fisher, at the time Sexton made this statement, the only part of the disputed work that was being performed at the jobsite was the installation of the support brackets.

⁴ Despite having entered into this stipulation, the Plumbers, as noted *infra*, contend that it is not seeking assignment of the disputed work.

procedures to settle jurisdictional disputes in the collective-bargaining agreement between Magnolia and the Plumbers. Finally, the Plumbers request, in the alternative, should the Board award the work to a union other than the Plumbers, that the order not purport to bar the Plumbers' right to proceed to arbitration under its collective-bargaining agreement with Magnolia and that the award limit itself to the dispute at the West Point Treatment Plant.

The Sheet Metal Workers and Millwrights contend that there are competing claims to the disputed work and that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. In support of this contention, the Sheet Metal Workers and Millwrights note that the parties stipulated to competing claims at the hearing, that the Plumbers' business manager, a business representative, and a job steward made statements claiming the work, that the Plumbers' business manager and a job steward threatened Magnolia's project superintendent with a walk off unless the disputed work was assigned to employees represented by the Plumbers, and that the Sheet Metal Workers and the Millwrights threatened economic action if the disputed work was reassigned. The Sheet Metal Workers and the Millwrights further contend that the Employers' assignments should be upheld on the basis of their collective-bargaining agreements with the Employers, the Employers' preference and past practice, area and industry practice, economy and efficiency, and relative skills and training. Finally, the Sheet Metal Workers and the Millwrights request an order coextensive with the Plumbers' jurisdiction, arguing that there is no evidence that the Plumbers intend to ease their pressure on contractors on future sites.

D. Applicability of the Statute

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated and that there is no agreed-on method for the voluntary resolution of the dispute.

As discussed above, it is undisputed that the Sheet Metal Workers and the Millwrights threatened economic action against Magnolia and Sound Air in order to prevent the reassignment of the disputed work. Accordingly, if there are competing claims to the disputed work between rival employee groups, there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. As noted above, however, the Plumbers contend that this is not a jurisdictional dispute because they seek contractual damages rather than assignment of the work. We reject this contention. In addition to filing a grievance and request for arbitration, the record indicates that representatives of the Plumbers made oral claims for the disputed work to

Magnolia officials in May and June 1994. Although the Plumbers' representative denied making any statements to Magnolia for the purpose of seeking the reassignment of the work and testified that the Plumbers' actions were limited to the filing of the grievance seeking compensation, it is well settled that a conflict in testimony does not prevent the Board from proceeding under Section 10(k), because in this type of proceeding the Board is not charged with finding that a violation did in fact occur but only that reasonable cause exists for finding such a violation. Further, notwithstanding its position, the Plumbers entered into a stipulation at the hearing claiming the disputed work in its entirety. Consequently, we conclude that there are active competing claims to disputed work between rival groups of employees.

At the hearing, the parties stipulated that there is no agreed-on method for the voluntary adjustment of the dispute in question that would bind all parties, and that the dispute in question had not been voluntarily adjusted so as to bind all parties.⁵

Based on our findings above, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The Plumbers' participation in the hearing in this matter was limited to the question of whether a jurisdictional dispute existed and did not extend to the merits of the dispute.

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

The parties stipulated at the hearing that there are no outstanding Board certifications relative to the disputed work.

⁵ We find no merit in the Plumbers contention that Magnolia waived its statutory right to file an 8(b)(4)(D) charge by agreeing to alternate procedures to settle jurisdictional disputes in its contract with the Plumbers.

Magnolia has contracts with the Plumbers and the Millwrights, but it is not a signatory to any contract with the Sheet Metal Workers. Article I, "Jurisdiction of the United Association," of the agreement between the Plumbers and Magnolia provides 54 specific examples of work over which the Plumbers have jurisdiction by virtue of the agreement. The disputed work is not included within the specific examples. Magnolia's agreement with the Millwrights, through reference to the United Brotherhood's constitution, covers "milling, fashioning, joining, assembling, erection, fastening or dismantling of all material of wood, plastic, metal, fiber, cork, and composition, and all other substitute materials," and the "[h]andling, cleaning, erecting, installing and dismantling of machinery, equipment and all materials used by members of the United Brotherhood." The installation of support brackets and covers requires the joining, assembling, erecting, and fastening of metal materials to concrete and each other, and is thus covered by the agreement. Sound Air's agreement with the Sheet Metal Workers specifically covers the "manufacture, fabrication, assembling, handling, erection, installation . . . of all ferrous or nonferrous metal work and all other materials used in lieu thereof and of all air-veyor systems and air-handling systems." The work being performed by the Sheet Metal Workers is an air-handling system, and is thus covered by the agreement. Accordingly, we find this factor favors an award to employees represented by the Millwrights and the Sheet Metal Workers.

2. Company preference and past practice

Magnolia has assigned the work on support brackets and tank covers to employees represented by the Millwrights and has subcontracted the aluminum duct work and duct work accessories work to Sound Air. Sound Air has, in turn, assigned the duct work and duct work accessories work to employees represented by the Sheet Metal Workers. Although the factor of company preference is not determinative, it favors an award to the Millwrights and Sheet Metal Workers.

Uncontradicted testimony indicates that Magnolia has never used employees represented by the Plumbers to perform similar work. Sound Air provided a list of 21 jobs on which it has performed work similar to that at the West Point Plant with the Sheet Metal Workers. This factor favors assignment to the Millwrights and Sheet Metal Workers.

3. Area and industry practice

Uncontradicted testimony at the hearing indicated that employees represented by the Millwrights have performed the installation of tank covers and supports for other contractors in the Seattle area. Sound Air also presented uncontradicted testimony that the use of employees represented by the Sheet Metal Workers for

the installation of duct work and duct work accessories is the industry standard in the Seattle area. There was evidence of only one project in western Washington where plumbers performed similar work and the plumbers were part of a composite crew with sheet metal workers. This factor, therefore, favors an award to the Millwrights and the Sheet Metal Workers.

4. Relative skills

Uncontradicted evidence indicates that employees represented by the Millwrights regularly perform the job functions and tasks required to install the brackets and covers and receive extensive training in those functions and in the use of the tools required to perform the task. There is no evidence in the record that employees represented by the Plumbers have either the experience or the training needed to perform these tasks. Undisputed testimony also indicates that employees represented by the Sheet Metal Workers regularly perform the installation of duct work and accessories. The Sheet Metal Workers-represented employees receive extensive training in the installation of the materials and in the fabrication of the duct and accessories. Again, there is no evidence that the Plumbers-represented employees have similar experience or training. We find, therefore, that this factor favors an award of the disputed work to employees represented by the Millwrights and the Sheet Metal Workers.

5. Economy and efficiency of operations

Nordstrom testified that the Millwrights, unlike the Plumbers, work throughout the entire length of a tank cell during the course of other activities they are performing, improving the flow of work during the installation of the covers, supports, and other mechanisms. Further, the other mechanisms being installed by the Millwrights are very close in elevation to the covers and supports and can be installed simultaneously with the covers and brackets. The Millwrights also supply their own tools. Nordstrom also testified that installation of the tank covers and brackets is intermittent, and the Millwrights perform other onsite carpentry work when not required to perform the disputed work. According to Nordstrom, using employees represented by the Plumbers would require pulling those employees from other assignments or getting employees for short duration jobs. Nordstrom testified that for these reasons it was more efficient and economical to use employees represented by the Millwrights to perform the disputed work. Finally, under Magnolia's contract with the Millwrights, carpenters and millwrights can function interchangeably, increasing the flexibility in Magnolia's scheduling.

Dupuis-Fricke testified that she attempts to keep a constant work force from job to job and to keep employees with similar skills so that their jobs are inter-

changeable. She testified that having a constant work force instills confidence in the employees because they know that every person with whom they work has a basic level of skill. Dupuis-Fricke also testified that using a regular crew allows them to work at other projects when they are not needed at West Point. The Sheet Metal Workers also supply their own tools.

We find that this factor favors an award of the disputed work to the employees represented by the Millwrights and the Sheet Metal Workers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Millwrights are entitled to perform all work on the support brackets and tank covers and that employees represented by the Sheet Metal Workers are entitled to perform all aluminum duct work and duct work accessories work. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, economy and efficiency of operations, and relative skills.

In making this determination, we are awarding the work to employees represented by the Millwrights and the Sheet Metal Workers, not to those Unions or their members.

Scope of the Award

The Employers request an award of the disputed work that is coextensive with the geographical jurisdiction of United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local #32. Generally, in order to support a broad award, there must be evidence that the disputed work has been a continuing source of controversy in the relevant geographic area, that similar disputes are likely to recur, and that the charged party has a proclivity to engage in unlawful conduct to obtain work similar to the disputed work. *Electrical*

Workers IBEW Local 211 (Sammons Communications), 287 NLRB 930, 934 (1987). We do not find that the record in this case supports a broad award. There is no indication in this record that the Plumbers are likely to engage in unlawful conduct in pursuit of work similar to the work in dispute at future projects. Accordingly, the award is limited to the controversy at the jobsite that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Magnolia Contractors, Inc., represented by the United Brotherhood of Carpenters and Joiners of America, Millwrights Local 204, AFL-CIO, are entitled to perform all work on support brackets and tank covers at the West Point Treatment Plant in Seattle, Washington.

2. Employees of Sound Air, Inc., represented by Sheet Metal Workers Local No. 66, AFL-CIO, are entitled to perform all aluminum duct work and duct work accessories work at the West Point Treatment Plant in Seattle, Washington.

3. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local #32, AFL-CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Magnolia Contractors, Inc. and Sound Air, Inc. to assign the disputed work to employees represented by it.

4. Within 10 days from this date, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local #32, AFL-CIO shall notify the Regional Director for Region 19 in writing whether it will refrain from forcing the Employers, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.